

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:)	
)	Case No. 04-60106
Daniel Miller d/b/a Danielson Grain,)	
d/b/a Danielson Trucking,)	
)	
_____)	
Gary Hoper,)	Adversary Case No. 04-6035
)	
Plaintiff,)	
)	
vs.)	NOTICE OF HEARING AND
)	MOTION TO AMEND
Daniel Miller,)	PLAINTIFF'S COMPLAINT
)	
Defendant.)	
_____)	

The Plaintiff, Gary Hoper, moves this court to permit him to amend his Complaint in the form of Exhibit A annexed hereto.

1. The Court will hold a hearing on this motion on September 28, 2004, at 11:00 a.m., U.S. Bankruptcy Courtroom, #204, U.S. Courthouse, 118 South Mill Street, Fergus Falls, Minnesota.

2. Any response to this motion must be filed and delivered not later than seven days, including intermediate Saturdays, Sundays and legal holidays, prior to the time set for the hearing, or mailed and filed not later than ten days before the hearing date. Unless a response opposing the motion is timely filed, the Court may grant the motion without a hearing.

3. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 34 Bankruptcy Rule 5005 and Local Rule 1070-1. The adversary proceeding in which this motion

is filed is a core proceeding. The case was originally commenced as an involuntary Chapter 7 proceeding by the filing of a petition on February 3, 2004. On February 19, 2004, the case was converted to a Chapter 11 proceeding. Said bankruptcy case and this adversary action are now pending in this Court. This motion arises under Rule 15 of the Federal Rules of Civil Procedure and Rule 7015 of the Rules of Bankruptcy Procedure.

4. By his proposed Amended Complaint, the Plaintiff seeks to add a Count Two based on the Defendant's sale and conversion of property the Plaintiff delivered to the Defendant for storage. The transaction, which forms the basis of Count Two of the Amended Complaint is already the subject of adversary no. 04-6043. After the filing of Plaintiff's original Complaint, Plaintiff and his counsel realized that if his storage claim was rejected in adversary no. 04-6043, the facts resulting in such a loss would arguably provide a basis for finding that any crops stored by the Plaintiff had been converted by the Debtor, thus, making the resulting debt non-dischargeable. Plaintiff wishes to amend his Complaint to address such a possibility.

Dated this 30th day of August, 2004.

VOGEL LAW FIRM

By: 

Jon R. Brakke

#10765

218 NP Avenue

P.O. Box 1389

Fargo, ND 58107-1389

(701) 237-6983

ATTORNEY FOR PLAINTIFF

Jon R. Brakke, counsel for the Plaintiff, the moving party named in the foregoing Notice of Hearing and Motion declares under penalty of perjury that the contents of this Motion are correct to the best of his knowledge, information and belief.

Dated this 30th day of August, 2004.

A handwritten signature in black ink, appearing to be 'Jon R. Brakke', is written over a horizontal line.

Jon R. Brakke

UNITED STATES BANKRUPTCY COURT
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_____)	
)	
Gary Hoper,)	Adversary Case No. 04-6035
)	
Plaintiff,)	
)	
vs.)	<u>AMENDED</u>
)	COMPLAINT TO DETERMINE
)	DISCHARGEABILITY OF DEBT
Daniel Miller,)	
)	
Defendant.)	
_____)	

Plaintiff, for its Amended Complaint to determine dischargeability of debt, states as follows:

I.

The Plaintiff is a resident of the State of Minnesota.

II.

The Defendant Debtor is a resident of Polk County, Minnesota, living in or near East Grand Forks, Minnesota.

III.

On February 3, 2004, an involuntary Chapter 7 petition was filed against the Debtor. The case was later converted to a proceeding under Chapter 11 on February 19, 2004.

IV.

This is a complaint to determine the dischargeability of debt.

V.

This is a core proceeding as provided for under 28 USC § 157(b)(2)(A) and (I), over which this Court has jurisdiction pursuant to 28 USC §§ 1576 and 1334 and various provisions of the Local Rules of the United States Bankruptcy Court for the District of Minnesota.

COUNT ONE

Debt Incurred on Purchase of Crops

VI.

Plaintiff restates and incorporates herein by reference the allegations in Paragraphs I through V above.

VII.

In November and December of 2003, the Defendant Debtor contracted to purchase 32,416.96 bushels of wheat from the Plaintiff. The value of the subject crop was \$103,128.07.

VIII.

At all times material, the Defendant Debtor expressly or impliedly represented to the Plaintiff that the Defendant Debtor had the financial resources to pay for the crop being purchased from the Plaintiff and that in all respects the Defendant Debtor was solvent.

IX.

On December 29, 2003, the Defendant Debtor issued two checks to the Plaintiff; one in the sum of \$53,128.07 and the other in the sum of \$50,000.00. Said checks were

dishonored as being issued on an account without sufficient funds to allow negotiation of the same. At all times material, the Defendant Debtor knew that the checks issued to the Plaintiff would be dishonored.

X.

The Defendant Debtor purchased wheat as above referenced from the Plaintiff at a time when the Defendant Debtor had liabilities in excess of \$5,000,000.00 and assets of less than \$1,700,000.00. At all times material the Defendant Debtor knew the Defendant Debtor had no ability to pay for the crop he was purchasing from the Plaintiff.

XI.

In connection with his business operations, the Defendant Debtor obtained a grain buyer's license from the State of Minnesota in connection with which the Defendant Debtor posted a bond in the sum of \$50,000.00. At all times material, the Defendant Debtor knew the nature of business operations did not qualify the Defendant Debtor to operate under a grain buyer's license. The \$50,000.00 posted by the Defendant Debtor did not reasonably reflect the liabilities being incurred by the Defendant Debtor in his business operations.

XII.

The above actions of the Defendant Debtor resulted in the Defendant Debtor obtaining property and/or extension of credit by the Plaintiff based on false pretenses, false representations and/or actual fraud. Additionally, the Defendant Debtor's conduct constituted willful and malicious injury by the Defendant Debtor with respect to the Plaintiff's interest and Plaintiff's property.

COUNT TWO

Sale of Stored Crop

XIII.

Plaintiff restates and incorporates herein by reference the allegations in Paragraphs I through XII.

XIV.

In late 2003, the Plaintiff delivered to the Defendant Debtor for purposes of storage 4,616.31 bushels of wheat.

XV.

The Plaintiff has asserted a claim for recovery of the above-referenced wheat or for recovery of the value of the same.

XVI.

The Defendant Debtor has objected to Plaintiff's claim alleging Plaintiff's crop was sold to the Defendant Debtor.

XVII.

The Defendant Debtor's sale of the crop stored by the Plaintiff constituted conversion of Plaintiff's property.

XVIII.

Alternatively, if Plaintiff is determined to have sold his wheat to the Defendant Debtor, said sale was made upon the express and implied representation, promise and warranty by the Defendant Debtor that the Defendant Debtor was solvent and had the ability to make payment

to the Plaintiff for the value of the subject crops.

XIX.

On information and belief Plaintiff states that if the crop Plaintiff stored with the Defendant Debtor was sold at the time of the sale the Defendant Debtor had liabilities in excess of \$5,000,000.00 and assets with a value of less than \$1,700,000.00. Thus, in connection with his dealings with Plaintiff's crop, the Defendant Debtor was aware that if the crop was purchased the Defendant Debtor would be unable to pay Plaintiff for the same.

XX.

On information and belief Plaintiff states that at the time of delivery of Plaintiff's crop and thereafter the Defendant Debtor was inducing producers to sell their crops to the Defendant Debtor with the intent of reselling said crops and using the proceeds to pay significantly older debts.

XXI.

The Defendant Debtor's actions referenced above resulted in the Defendant Debtor obtaining property and/or an extension of credit by false pretenses, false representations and/or actual fraud and constitute willful and malicious injury by the Defendant Debtor to the interest of the Plaintiff and Plaintiff's property.

WHEREFORE, Plaintiff prays for judgment against the Defendant Debtor as follows:

1. For a determination that the Defendant Debtor's obligation to the Plaintiff in the minimum sum of \$119,000.00 together with all attorney's fees and costs incurred by the

Plaintiff constitute obligations nondischargeable under the provisions of 11 USC § 523(a)(2)(A) and (a)(6).

2. For his costs and disbursements incurred herein.
3. For such other and further relief as this deems just and equitable.

Dated this 21st day of July, 2004.

VOGEL LAW FIRM

By: 

Jon R. Brakke

#10765

218 NP Avenue

P.O. Box 1389

Fargo, ND 58107-1389

(701) 237-6983

ATTORNEY FOR PLAINTIFF

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

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Gary Hoper,)	Adversary Case No. 04-6035
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Plaintiff,)	
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vs.)	BRIEF IN SUPPORT OF
)	MOTION TO AMEND
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)	
Defendant.)	
_____)	

This adversary proceeding was commenced in June of 2003. The original Complaint was premised on the alleged fraud of the Defendant in inducing Plaintiff to sell goods to the Defendant. In addition to the sales that were the subject of Plaintiff's Complaint, Plaintiff believed that in a separate transaction he had rented bin space from the Defendant to store crops owned by the Plaintiff. The existence of the storage agreement is one of the issues involved in adversary no. 04-6043 (grain claim determination adversary action).

Only after the filing of this adversary action and reviewing answers completed by various other defendants in adversary no. 04-6043, did Plaintiff and Plaintiff's attorney realize there might be a possibility that, without Plaintiff's permission, Defendant had sold the crops Plaintiff had placed in storage and encumbered the proceeds. In particular, this assertion made by Bremer Bank in its answer to the Complaint in adversary no. 04-6043. Such an action by

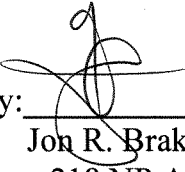
the Defendant might defeat Plaintiff's claim in adversary no. 04-6043 leaving Plaintiff without a remedy. However, in that such conduct would arguably make the debt nondischargeable, Plaintiff believes the same is an appropriate subject for litigation in this action.

Rule 15(a) of the Federal Rules of Civil Procedure, which is made applicable in this proceeding by Rule 7015 of the Rules of Bankruptcy Procedure, states that leave to amend a pleading shall be freely given when justice so requires. As noted above, the transaction that Plaintiff seeks to raise by the proposed amendment is already the subject of litigation between the parties-adversary no. 04-6043 (although the precise legal remedies sought with respect to the transaction are different), thus, it is not believed that the proposed amendment can be claimed by the Defendant to come as a surprise. The Defendant has engaged in limited discovery to-date (written Interrogatories and Demand for Production of Documents). The, the amendment will not require the same to be duplicated. Plaintiff has filed a motion to extend the discovery deadline in this case. Thus, Defendant will have more than adequate time to pursue any discovery he believes is necessary as to the new claim Plaintiff wishes to assert.

Plaintiff should be permitted to pursue all claims respecting the alleged nondischargeability of the debt he is owed by the Defendant in the instant adversary proceeding. The amendment requested by Plaintiff will not prejudice the Defendant and thus, no good reason exists to deny Plaintiff the right to amend his Complaint.

Dated this 30th day of August, 2004.

VOGEL LAW FIRM

By: 

Jon R. Brakke

#10765

218 NP Avenue

P.O. Box 1389

Fargo, ND 58107-1389

(701) 237-6983

ATTORNEY FOR PLAINTIFF

RE: Gary Hoper v. Daniel Miller, d/b/a Danielson Grain and d/b/a Danielson Trucking
Adversary Action No. 04-6035

STATE OF NORTH DAKOTA

)

AFFIDAVIT OF SERVICE

) ss

BY MAIL

COUNTY OF CASS

)

Holly A. Kittelson, being first duly sworn on oath, does depose and say: She is a resident of County of Cass, City of Fargo, State of North Dakota, is of legal age and not a party to or interested in the above entitled matter.

On August 30, 2004, your affiant served the following documents:

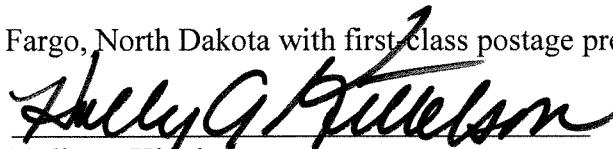
**NOTICE OF HEARING AND MOTION TO AMEND PLAINTIFF'S
COMPLAINT, SUPPORTING BRIEF, AND PROPOSED ORDER**

by placing true and correct copies in envelopes addressed as follows:

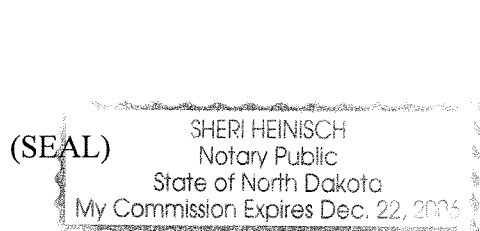
David C. McLaughlin
Attorney at Law
212 2nd St. NW
Ortonville, MN 56278

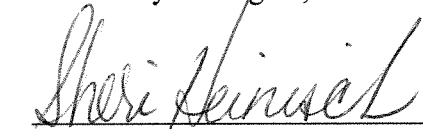
US Trustee
U.S. Courthouse
300 South 4th St., Suite 1015
Minneapolis, MN 55415

and causing them to be placed in the mail at Fargo, North Dakota with first class postage prepaid.


Holly A. Kittelson

Subscribed and sworn to before me this 30th day of August, 2004.




Notary Public